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JAN 22 2010

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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EASTERN DISTRICT OF CALIFORNIA

6 In re:) Case No. 09-90326-D-7

7 BRASIL BROTHERS DAIRY,)
8)
9 Debtor.)

10 GARY FARRAR, Chapter 7 Trustee,) Adv. Pro. No. 09-9076-D

11) Docket Control No. BMJ-1
12 Plaintiff,)13 v.)
14 NATIONAL MILK PRODUCERS) DATE: January 13, 2010
15 FEDERATION, et al.,) TIME: 10:30 a.m.
16 Defendants.) DEPT: D17 This memorandum decision is not approved for publication and may
18 not be cited except when relevant under the doctrine of law of
the case or the rules of claim preclusion or issue preclusion.MEMORANDUM DECISION

20 On November 20, 2009, defendant National Milk Producers
 21 Federation, dba CWT-Cooperatives Working Together ("CWT"), filed
 22 a notice of motion and memorandum of law in support of motion to
 23 dismiss, bearing Docket Control No. BMJ-1 (the "Motion"),¹ in
 24 which CWT seeks dismissal of the plaintiff's only claims for
 25 relief against CWT, the third, fourth, and fifth claims for
 26 relief in the complaint -- for turnover, damages for violation of
 27 the automatic stay, and avoidance of a post-petition transfer,

28
 1. CWT having filed no separate document entitled motion to
 dismiss, these two documents will be treated as the motion.

1 respectively. For the reasons set forth below, the court will
2 grant the Motion in part.

3 I. INTRODUCTION

4 Brasil Brothers Dairy (the "debtor") commenced this
5 bankruptcy case on February 9, 2009 by the filing of a voluntary
6 chapter 7 petition.² According to the chapter 7 trustee and
7 plaintiff herein, Gary Farrar (the "trustee"), on February 18,
8 2009, CWT issued a check for \$323,745 payable to defendant Maria
9 Enes ("Enes"), which it delivered to Enes through her attorney,
10 Frank Lima ("Lima"). The trustee alleges that the check
11 represented a portion of the proceeds due the debtor for cattle
12 it had sold on January 1 and 2, 2009 pursuant to the CWT Dairy
13 Herd Retirement Program (the "CWT program").³

14 The trustee contends that the \$323,745 was property of the
15 bankruptcy estate at the time it was paid to Enes, and thus, he
16 seeks turnover of those funds from CWT as a payment in violation
17 of the automatic stay of 11 U.S.C. § 362(a). He also seeks
18 damages, including fees and costs, for this stay violation, and
19 avoidance of the payment as an unauthorized post-petition
20 transfer.

21 CWT seeks dismissal on the grounds that (1) turnover is not
22 available as to property the defendant no longer possesses or
23 controls unless the defendant was a fiduciary of the debtor, and
24

25 2. Unless otherwise indicated, all Code, chapter, section
and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
1330, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9036.

26 3. Under the CWT program, the CWT pays a certain sum of
27 money to a participating dairy in exchange for the dairy selling
28 its herd for slaughter.

1 in this case, there was no such fiduciary relationship, (2) CWT
2 did not violate the stay because it did not know of the existence
3 of the bankruptcy case or the stay at the time of the payment,
4 (3) as a transfer initiated by the debtor, the payment to Enes
5 was not covered by the stay, and (4) all three claims for relief
6 should be dismissed because the funds were the subject of a pre-
7 petition absolute assignment by the debtor, and thus, were not
8 property of the estate at the time of the chapter 7 filing or at
9 the time of the payment to Enes. The Motion is brought pursuant
10 to Fed. R. Civ. P. 12(b)(6), incorporated in this proceeding by
11 Fed. R. Bankr. P. 7012(b), for failure to state a claim upon
12 which relief can be granted.

13 II. ANALYSIS

14 This court has jurisdiction over the Motion pursuant to 28
15 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding
16 under 28 U.S.C. § 157(b)(2)(A), (E), and (O).

17 A. Standards for Dismissal under Rule 12(b)(6)

18 The United States Supreme Court has recently adopted a
19 "plausibility" standard for assessing Rule 12(b)(6) motions,
20 analyzing the complaint before it in terms of whether it
21 contained enough factual allegations, taken as true, to plausibly
22 suggest that the plaintiff was entitled to relief. Bell Atl.
23 Corp. v. Twombly, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929, 945
24 (2007). "[W]e do not require heightened fact pleading of
25 specifics, but only enough facts to state a claim to relief that
26 is plausible on its face." 127 S. Ct. at 1974.

27 The Court did not disturb its earlier pronouncement in
28 Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683 (1974), that on a

1 motion to dismiss, "[t]he issue is not whether a plaintiff will
2 ultimately prevail but whether the claimant is entitled to offer
3 evidence to support the claims." 416 U.S. at 236. Thus, "a
4 well-pleaded complaint may proceed even if it appears 'that a
5 recovery is very remote and unlikely.'" Bell Atl. Corp., 127 S.
6 Ct. at 1965, quoting and characterizing Scheuer v. Rhodes, 416
7 U.S. at 236.

8 B. The Alleged Absolute Assignment

9 The crux of the matter is a document entitled "Authorization
10 and Instruction," dated January 7, 2009 and signed by Antonio
11 Brasil and Pedro Brasil, individually and dba Brasil Bros. Dairy.
12 Pursuant to that document, the Brasil brothers purported to
13 "authorize and instruct [CWT] to deliver a check made payable to
14 Maria Enes in the amount of \$323,745.20 and deliver said payment
15 to the Law Office of Frank M. Lima [address], from the amount
16 otherwise payable to us by CWT."⁴ CWT contends that this
17 document constituted an absolute assignment to Enes of the right
18 to the funds, and thus, that the right to the funds was no longer
19 property of the debtor after the assignment was made and was not
20 property of the estate on the petition date or at the time of the
21 payment.

22 While no particular form of assignment is necessary,
23 the assignment, to be effectual, must be a
24 manifestation to another person by the owner of the
right indicating his intention to transfer, without
further action or manifestation of intention, the right
to such other person, or to a third person (citations).
25 Cockerell v. Title Ins. & Trust Co., 42 Cal. 2d 284, 291 (1954).
26

27 4. Reply to Plaintiff's Opposition to Defendant National
28 Milk Producers Federation, dba Cooperatives Working Together's
Motion to Dismiss, filed December 16, 2009, Ex. A.

1 The burden of proving an assignment is on the party
2 asserting it, and the evidence must be sufficiently "clear and
3 positive" to protect the obligor from any further claim by the
4 assignor. Id. at 292.

5 If from the entire transaction and the conduct of the
6 parties it clearly appears that the intent of the
7 parties was to pass title to the chose in action, then
8 an assignment will be held to have taken place.
(Citations.) From the foregoing it will be evident
that "intent" is of major significance.

9 McCown v. Spencer, 8 Cal. App. 3d 216, 226-27 (1970).

10 In the present case, assuming arguendo the authenticity of
11 the Authorization and Instruction, the language of that document
12 is far from sufficient to establish that the parties intended an
13 assignment of the debtor's rights as regards its CWT
14 participation and the proceeds due from CWT. See E.B.C. Trust
15 Corp. v. JB Oxford Holdings, Inc., 2005 U.S. Dist. LEXIS 46806,
16 at *13-14 (C.D. Cal. 2005) ("Genuine issues of fact exist which
17 preclude the court from determining whether the notes were
18 assigned to Plaintiff EBC, including whether Oeri executed the
19 assignment and intended to transfer the notes to EBC as well as
20 when and how Plaintiff obtained both the notes.").

21 In a case similar to this one, the debtor had, pre-petition,
22 signed a document with this language: "I hereby authorize and
23 direct you, my attorney, to pay directly to the Coolidge Physical
24 Therapy Center, such sums as may be due and owing for services
25 rendered me by reason of this accident" When the
26 bankruptcy trustee later settled the lawsuit, the therapy center
27 asserted a right to the proceeds by way of assignment. The court
28 concluded that the above language "does not manifest an intent to

1 transfer the bankrupt's right of action to any other person and
 2 did not result in an assignment." In re Colby, 1980 Bankr. LEXIS
 3 4689, *5-6 (Bankr. C.D. Cal. 1980). See also Ocean Marine Ins.
 4 Co. v. Wickland Corp., 1995 U.S. Dist. LEXIS 3085, at *26 (N.D.
 5 Cal. 1995) ("[A]n order to pay proceeds is not sufficient to
 6 effect an assignment of all rights under the contract.").

7 Finally, even an absolute assignment does not preclude the
 8 possibility that the assignor retains a right to some or all the
 9 proceeds. See Cohn v. Thompson, 128 Cal. App. Supp. 783, 788
 10 (1932) ("Provided the assignment is absolute, so as to vest the
 11 apparent legal title in the assignee, the latter is entitled to
 12 sue in his own name, whatever collateral arrangements have been
 13 made between him and the assignor respecting the proceeds.")

14 In short, the trustee's allegations, if proven, would
 15 support the conclusion that the debtor merely directed CWT to pay
 16 to Enes a particular portion of the amount otherwise payable to
 17 the debtor, and not that the debtor made an assignment of all its
 18 rights to Enes, such as would defeat the trustee's claims.

19 C. Lack of Present Possession or Control

20 CWT contends the trustee cannot compel it to turn over the
 21 \$323,745 in proceeds because it no longer has possession or
 22 control of the funds, having paid them to Enes. However, it is
 23 necessary only that the defendant in a turnover action have had
 24 possession, custody, or control of the property in question at
 25 some time during the case. Section 542(a); Cassel v. Globerson
 26 (In re Kolb), 2007 Bankr. LEXIS 1896, at *12-13 (Bankr. N.D. Cal.
 27 2007). The trustee alleges that CWT issued the check on February
 28 18, 2009, nine days after the case was commenced. The cause of

1 action is not defeated simply because CWT no longer has the
 2 funds.⁵ Any seeming unfairness in this result is countered by
 3 the availability of a § 542(c) defense.

4 D. Knowledge of the Bankruptcy Case and/or the Stay

5 CWT contends the complaint does not state a claim for
 6 damages for violation of the automatic stay because it does not
 7 sufficiently allege that CWT knew of the bankruptcy case or the
 8 stay at the time it issued the check to Enes.

9 The court agrees. There is but a single allegation in the
 10 complaint pertaining in any way to this issue; namely, a
 11 reference to this single line in a February 11, 2009 fax from the
 12 debtor's counsel to CWT: "Re: Brasil Brothers Dairy Chapter 7
 13 case No. 09-90326." If the claim for relief is to survive, the
 14 court must infer, based on that single allegation, that CWT had
 15 knowledge of the automatic stay at the time of the payment. The
 16 allegation is not sufficient to support the inference.

17 It is also significant that the trustee omitted the word
 18 "willfully" when referring to CWT's alleged violation in his
 19 fourth claim for relief, but included it when describing Enes'
 20 and Lima's alleged violations.

21 Moreover, the complaint is vague as to the statutory
 22 underpinning of this claim for relief, referring only to § 362,
 23 presumably § 362(k)(1). However, the trustee cannot recover
 24 damages under that section because he is not an "individual" for
 25 purposes of the statute. Havelock v. Taxel (In re Pace), 67 F.3d
 26 187, 193 (9th Cir. 1995). Although § 105(a) provides a remedy if
 27

28 5. Thus, the court need not reach the issue of whether a
 fiduciary relationship existed between the debtor and CWT.

1 the trustee can demonstrate that CWT's payment to Enes rose to
2 the level of civil contempt (*id.*), the complaint in this case
3 does not mention either § 105(a) or contempt, and it does not
4 allege facts sufficient to support the necessary finding of
5 willfulness. See Knupfer v. Lindblade (In re Dyer), 322 F.3d
6 1178, 1189 (9th Cir. 2003).

7 Whereas for purposes of § 362(k)(1), a person with knowledge
8 of the bankruptcy case itself is charged with knowledge of the
9 automatic stay (In re Pinkstaff, 974 F.2d 113, 115 (9th Cir.
10 1992)), the same is not true in contempt proceedings. Knupfer at
11 1191-92. For a finding of contempt, a plaintiff must establish
12 that the defendant knew of the existence of the stay itself. Id.
13 Here, the factual allegations, taken as true, are not sufficient
14 to plausibly suggest that CWT was aware of the bankruptcy case or
15 the automatic stay at the time of the payment to Enes. Thus, the
16 fourth claim for relief, as against CWT, will be dismissed with
17 leave to amend.

18 The trustee's third claim for relief, for turnover by CWT,
19 appears to depend on an allegation that the payment was made in
20 violation of the stay. However, it is not necessary for a cause
21 of action for turnover that there have been a violation of the
22 automatic stay, only that an entity other than a custodian have
23 been in possession, custody, or control of property of the estate
24 during the case. § 542(a). Although it is alleged in the
25 trustee's second claim for relief, for turnover by Enes, that the
26 cash value of the payment is property of the estate, the third
27 claim for relief does not clearly allege that the funds, at the
28 time CWT paid them to Enes, were property of the estate. Thus,

1 the third claim for relief will also be dismissed with leave to
 2 amend.

3 E. Transfer Initiated by the Debtor

4 CWT contends that the transfer of the funds to Enes did not
 5 violate the stay because the debtor initiated the transfer. It
 6 is the law in the Ninth Circuit that "[the] automatic stay does
 7 not apply to sales or transfers of property initiated by the
 8 debtor." Burkart v. Coleman (In re Tippett), 542 F.3d 684, 691
 9 (9th Cir. 2008), quoting Schwartz v. United States (In re
 10 Schwartz), 954 F.2d 569, 574 (9th Cir. 1992).

11 However, the issue of who initiated the transfer is a
 12 question of fact that cannot be decided on the pleadings.
 13 Further, the allegations of the complaint, if proven, would
 14 support the conclusion that the transfer was initiated by Enes
 15 and/or her attorney, rather than by the debtor.⁶

16 III. CONCLUSION

17 For the reasons set forth above, the Motion will be denied
 18 as to the trustee's fifth claim for relief (avoidance of post-
 19 petition transfer) and granted as to the third and fourth claims
 20 for relief (turnover and violation of the stay), which will be
 21 dismissed with leave to amend. Amendments to pleadings are to be
 22 liberally allowed in view of the policy favoring determination of
 23 disputes on their merits. See Fed. R. Bankr. P. 7015,
 24 incorporating Fed. R. Civ. P. 15(a)(2); Magno v. Risqby (In re

26 27 28 6. It appears, although the court need not decide at this time, that the only action taken by or on behalf of the debtor toward the initiation of the transfer was the signing of the Authorization and Instruction, which occurred pre-petition, and thus, before the automatic stay came into play.

1 Magno), 216 B.R. 34, 38 (9th Cir. BAP 1997), citing Forsyth v.
2 Humana, Inc., 114 F.3d 1467, 1482 (9th Cir. 1997), United States
3 v. Webb, 655 F.2d 977, 979 (9th Cir. 1981). The court finds
4 neither undue prejudice to CWT, bad faith on the part of the
5 trustee, futility of any possible amendment, nor undue delay,
6 such as might warrant dismissal without leave to amend. See
7 Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir. 1999).

8 The court will issue an appropriate order.

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10 Dated: January 27, 2010



11 ROBERT S. BARDWIL
12 United States Bankruptcy Judge
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CERTIFICATE OF MAILING

I, Andrea Lovgren, in the performance of my duties as Deputy Clerk to the Honorable Robert S. Bardwil, mailed by ordinary mail a true copy of the attached document on today's date to each of the parties listed below:

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Deputy Clerk